

S E R V E D

February 27, 2009

FEDERAL MARITIME COMMISSION

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WASHINGTON, D.C.

DOCKET NO. 08-05

**CITY OF LOS ANGELES, CALIFORNIA, HARBOR DEPARTMENT OF THE CITY OF
LOS ANGELES, BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LOS
ANGELES, CITY OF LONG BEACH, CALIFORNIA, HARBOR DEPARTMENT OF
THE CITY OF LONG BEACH, AND THE BOARD OF HARBOR COMMISSIONERS
OF THE CITY OF LONG BEACH - POSSIBLE VIOLATIONS OF SECTIONS 10(b)(10),
10(d)(1) AND 10(d)(4) OF THE SHIPPING ACT OF 1984**

**MEMORANDUM AND ORDER ON
MOTION FOR LEAVE TO APPEAL DENIAL OF MOTION FOR STAY**

On January 22, 2009, I denied Respondents motion to stay this proceeding until the "Commission and [Bureau of Enforcement (BOE)] comply with the National Environmental Policy Act . . . and the Commission's rules . . . which require that the Commission begin preparation of an Environmental Impact Statement . . . when it issues an order of investigation in a proceeding that may have a significant impact upon the environment." (Motion for Stay at 2.) *See City of Los Angeles, California, et al., - Possible Violations of Sections 10(b)(10), 10(d)(1) and 10(d)(4) of the Shipping Act of 1984*, FMC No. 08-05 (ALJ Jan. 22, 2009) (Memorandum and Order on Petitions for Leave to Intervene Pursuant to Rule 502.72 and Motion for Stay). On February 6, 2009, Respondents filed a Motion for Leave to Appeal and Appeal from Denial of Respondents Motion to Stay (Motion for Leave to Appeal). On February 23, 2009, BOE filed its opposition to the motion for leave to appeal. The motion for leave to appeal is denied.

Respondents sought a stay based on their contention that National Environmental Policy Act (NEPA), its regulations, and the Commission's regulations promulgated pursuant to NEPA "require that the Commission begin preparation of an Environmental Impact Statement . . . when it issues an order of investigation in a proceeding that may have a significant impact upon the environment." *City of Los Angeles, California, et al., - Possible Violations of Sections 10(b)(10), 10(d)(1) and 10(d)(4) of the Shipping Act of 1984*, FMC No. 08-05, Memorandum at 15-18 (ALJ Jan. 22, 2009) (Memorandum and Order on Petitions for Leave to Intervene Pursuant to Rule 502.72 and Motion

for Stay). I found that Respondents had not established that they were likely to prevail on the merits of their claim, that they would be irreparably harmed absent a stay, that others would not be substantially harmed by stay; and that the public that would be served by staying the proceeding. *Id.* at 19-21.

Respondents contend that an appeal of the denial of their motion for stay is warranted for at least three reasons:

First, the Respondents' case would be unduly prejudiced if the Presiding Officer is denied the opportunity to consider findings that may be favorable to Respondents regarding the environmental impacts associated with stopping key elements of the Ports' Clean Truck Programs ("CTP"). Second, the Commission has never addressed the questions raised by Respondents' Motion to Stay in any prior adjudication or other final agency action, making a ruling on these issues not only in the public interest, but of great importance given the serious consequences that would follow if the result of this proceeding were to impede the vital, on-going efforts to secure the Ports and alleviate air pollution in southern California. Third, this proceeding will be substantially delayed if the typically lengthy EIS process, which is intended to commence at the onset of the Commission's investigation, is ordered belatedly. For the foregoing reasons, the Respondents request an opportunity to resolve these time-sensitive questions of first impression with an immediate appeal.

(Motion for Leave to Appeal at 2-3 (footnotes omitted).)

Commission Rule 153 provides that a presiding officer may allow an interlocutory appeal of a denial of a motion for stay if he or she finds it necessary "to prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party." 46 C.F.R. § 502.153(a). Respondents have not established any of these elements.

As Respondents recognize, on October 14, 2008, the Natural Resources Defense Council, Coalition for Clean Air, and Sierra Club (Environmental Petitioners) filed a petition with the Commission asking that the Commission "conduct any and all environmental analysis required by federal law before taking any action that would interfere with the full implementation of the Port of Los Angeles and Long Beach's Clean Trucks Program." (Petition of [Environmental Petitioners] Related to Federal Maritime Commission Evaluation and Actions on the Ports of Los Angeles and Long Beach's Clean Trucks Programs at 2.) On October 23, 2008, the Commission's Secretary responded by letter denied the Petition. (Letter dated October 23, 2008, from Secretary to Mr. David Pettit.) On October 25, 2008, the Environmental Petitioners filed an appeal of the Secretary's decision. (Appeal of Federal Maritime Commission Staff's Denial of Petition of [Environmental Petitioners] Related to Federal Maritime Commission Evaluation and Actions on the Ports of Los Angeles and Long Beach's Clean Trucks Programs.) Consequently, the question that Respondents want to put before the Commission by appealing the denial of their motion for stay has already been presented to the Commission. As stated in the memorandum denying the stay:

If, upon its review of the determination set forth in the Secretary's letter of October 23, 2008, the Commission determines that an EIS is necessary for this proceeding, deadlines for discovery and submissions could be adjusted (if necessary) to permit gathering and submission of evidence related to and preparation of the EIS prior to the presiding officer's Initial Decision.

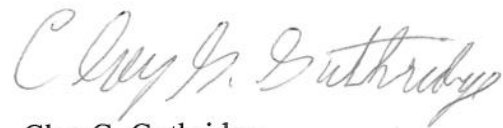
City of Los Angeles, California, et al., - Possible Violations of Sections 10(b)(10), 10(d)(1) and 10(d)(4) of the Shipping Act of 1984, supra, Memorandum at 21. Therefore, the presiding officer will not be "denied the opportunity to consider findings that may be favorable to Respondents regarding the environmental impacts associated with stopping key elements of the Ports' [CTP]" if the Commission ultimately determines that NEPA requires the preparation of an EIS. Delaying this proceeding will not "prevent substantial delay" in putting this question to the body ultimately responsible for the Commission's final decision on this question as the question is already before that body.¹ To the contrary, a stay would bring to a halt discovery and other activity developing the case while the parties wait for something that may never become part of the proceeding.

For the reasons stated in the January 22, 2009, Memorandum and Order, Respondents have not established that an immediate appeal is necessary "to prevent substantial . . . expense, or detriment to the public interest, or undue prejudice to a party." 46 C.F.R. § 502.153(a).

ORDER

Upon consideration Respondents' Motion for Leave to Appeal and Appeal from Denial of Respondents Motion to Stay, the Bureau of Enforcement's opposition thereto, the record herein, and for the reasons stated above, it is hereby

ORDERED that Respondents' Motion for Leave to Appeal from Denial of Respondents Motion to Stay be **DENIED**.



Clay G. Guthridge
Administrative Law Judge

¹ Respondents state that "[n]otwithstanding the pending appeal initiated by the [Environmental Petitioners] the Commission has not yet formally addressed its obligations under NEPA and may not do so in the near term. An appeal by the Ports, however, would focus the Commission on resolving these important preliminary matters." (Motion for Leave to Appeal at 3 n.2.) I reject the implication that an appeal is necessary to "focus the Commission" on matters pending before it.